



SENT VIA EMAIL

January 14, 2013

Delta Stewardship Council
980 9th Street, Suite 1500
Sacramento, California 95814
Rulemakingprocesscomment@deltacouncil.ca.gov

Re: Office of Administrative Law Regulatory Package

Dear Council Members:

The San Joaquin Tributaries Authority and its members¹ ("SJTA") appreciate the opportunity to comment on the regulatory package prepared for the Office of Administrative Law ("OAL"). As the Delta Stewardship Council ("DSC") is aware, the Administrative Procedure Act ("APA") governs an agency rulemaking process. The SJTA has concerns regarding the proposed regulations and requests that the DSC remedy the following issues prior to sending the package to the OAL.

Notice of Proposed Rulemaking

California Government Code section 11346.5 sets the requirements for the DSC Notice of Proposed Rulemaking ("Notice"). The Notice fails to meet all of those requirements.

The Notice's "Informative Digest" must evaluate consistency and compatibility with existing State laws. (Gov. Code, §11346.5(a)(3)(D).) While the Notice identifies several sections of the Water Code and Public Resources Code, it does not evaluate consistency with Water Code section 10608.8. As explained below and specific to proposed section 5007, Water Code section 10608.8 (part of SB X7 7) directly contradicts the proposed section 5007. Not addressing this contradiction violates the Notice requirements.

The SJTA requests the DSC revise the Notice to conform to Government Code section 11346.5.

¹ SJTA members include the Merced Irrigation District, Modesto Irrigation District, Turlock Irrigation District, Oakdale Irrigation District, and South San Joaquin Irrigation District.

Regulations

California Government Code section 11349.1 provides standards for regulations which include necessity, authority, clarity, consistency, reference, and non-duplication. (Gov. Code, §11349.1(a)(1) – (6).) Several proposed regulations do not meet these standards. Specifically, the proposed regulations repeatedly do not meet the “authority, “clarity” and “consistency” standards. (Gov. Code, §11349.1(a)(2), (3), and (4), respectively.) Clarity “means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them” (Gov. Code, § 11349(c).) Consistency “means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law.” (Gov. Code, § 11349(d).) Authority “means the provision of law which permits or obligates the agency to adopt, amend, o repeal a regulation.”

Article 1, section 5001(s)

Section 5001(s) defines a “significant impact” to mean a “change in baseline conditions[.]” “Baseline conditions” is not defined and is subject to several interpretations, thereby falling short of the clarity of standard. To remedy this defect, section 5001(s) must define a particular baseline condition.

Article 3, section 5005

Section 5005 is the language of WR P1, which misses the mark with regard to the legislature’s intent in Water Code section 85021 and fails to meet the authority, clarity and consistency standards because it is inconsistent with existing law, and is vague and ambiguous as to the definition of “reduced reliance.” Section 5005 contains several statements which render the policy flawed in such a way that it will not meet regulatory standards. First, section 5005 begins by stating that compliance “will be demonstrated through a significant reduction in the amount of water use, or in the percentage of water used, from the Delta watershed.” Upstream water users, who do not rely on the Delta, are not required to mitigate for users’ reliance on the Delta; requiring this goes beyond the State’s policy and the DSC’s authority. Further, section 5005 threatens to infringe on the priority of existing water rights because it would require water users which benefit from an earlier priority to forego the water which would otherwise be diverted and distributed pursuant to those rights, and allow downstream users to take that water—sometimes without a water right at all. This is contrary to existing statutory and case law.

Section 5005 is also contrary to Water Code section 85302 which identifies that the geographic scope for projects and programs identified in the Delta Plan “**shall** be the Delta[.]” (Water Code, § 85302(b).) While section 85302(b) allows for recommendations outside of the Delta, it is unambiguous that the Delta Plan shall remain focused on the legal Delta. Section 5005 goes beyond the authority allowed by the legislature and will not be able to withstand a legal challenge. The SJTA therefore requests the DSC revise section 5005 to remove the language which applies to the Delta watershed (i.e. upstream water users) and that which “require[s] a reduction in the total water used.” In the alternative, section 5005 could be changed to a recommendation in the Delta Plan and removed as a proposed regulation.

Next, section 5005(b) states that the intent of the policy is to ensure water suppliers comply with statutory requirements of SB X7 7. This statement is contrary to language of SB X7 7. Water Code section 10608.8(c), part of SB X7 7, states:

This part does not require a reduction in the total water used in the agricultural or urban sectors, because other facts, including, but not limited to, changes in agricultural economics or population growth may have greater effects on water use.

Section 5005 specifically requires a “significant reduction in the amount of water use.” Thus, the compliance required by section 5005 is directly inapposite to SB X7 7, which expressly states that it “does not require a reduction in the total water used.” Therefore, as currently drafted, section 5005 is contrary to existing law and fails to meet the consistency standard. Further, section 5005 fails to meet the “reference” standard because it does not cite to the statutes which arose from SB X7 7. (Gov. Code, §§ 11349, 11349.1(5).)

Section 5005 also fails to properly define “reduced reliance on the Delta.” As currently drafted, section 5005 states that reliance will be reduced when water suppliers identify, evaluate, and commence implementation of “all programs and projects that are local cost effective and technically feasible that reduce reliance on the Delta.” The conundrum with this is that section 5005 defines “reduced reliance” with “programs and projects which reduce reliance.” This is unhelpful and offers no guidance to water suppliers because it defines “reduced reliance” with “reduce reliance,” thereby failing to meet the clarity standard.

The language of section 5005 falls drastically short of meeting the standards set forth in the APA; the SJTA therefore requests that the DSC revise section 5005 to ensure compliance.

Article 3, section 5007

Section 5007 directs the State Water Board to develop, implement and enforce new and updated flow objectives for the Bay-Delta Water Quality Control Plan (“Bay-Delta Plan”):

The State Water Resources Control Board should update the Bay-Delta Water Quality Control Plan objectives as follows:

- a) By June 2, 2014, adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goals.*
- b) By June 2, 2018, adopt, and as soon as reasonably possible, implement flow objectives for high-priority tributaries in the Delta watershed that are necessary to achieve the coequal goals.*

This regulation is flawed for several reasons.

Section 5007 oversteps DSC authority. The Delta Plan acknowledges that the Delta Reform Act allows the DSC regulatory jurisdiction over covered actions, and that “entities proposing covered actions must comply with the regulations (policies) in the Delta Plan.” (Final Draft Delta Plan, at 5) It further states that the Delta Plan contains “policies that will be enforced by the Council’s appellate authority and oversight” (*Id.*, at 39), and “The current regulatory provisions of the Delta Plan, including the consistency review and appeals process, apply to only covered actions[.]” (*Id.*, Sidebar, at 50) Further, the DSC’s authority is limited “to adopt regulations or guidelines as needed to carry out the powers and duties identified in [Division 35, Sacramento-San Joaquin Delta Reform Act of 2009].” (Water Code, § 85210.) The DSC does not have authority to require the State Water Resources Control Board

(“State Water Board”) to update the Bay-Delta Water Quality Control Plan, nor does it allow for the DSC to set a timeline for such update.

Further, this regulation oversteps the authority of the DSC by proposing to govern actions that are not covered actions. The State Water Board review of the Bay-Delta Plan is expressly exempt as covered action. (Delta Plan, at 57 [“These exemptions include ... A regulatory action of a State agency (such as the adoption of a water quality control plan by the SWRCB ...”).] Therefore section 5007 cannot have regulatory authority because the DSC’s regulatory jurisdiction is limited to covered actions; it cannot regulate the State Water Board review of the Bay-Delta Plan. Further, section 5007 unambiguously calls only for an action by the State Water Board which is exempt as a covered action, leaving the policy with no other covered action to govern.

Next, the deadlines in section 5007 fail to meet the clarity standard. Section 5007 calls for updated and implemented flow objectives “for the Delta” by June 2, 2014. The State Water Board has made the decision to phase its review of the Bay-Delta Plan, with each phase having its own environmental review. The State Water Board released its Substitute Environmental Document (“SED”) for Phase 1, occurring *outside* of the Delta, on December 31, 2012 and has not yet scheduled a date for release of an SED for the phase(s) which may include the Delta. The SED is a draft environmental document, to which months of a comment period is afforded, with the final later being adopted. A 2014 deadline for final flow objectives, as well as implementation, for the Delta is beyond unlikely to occur and it is unclear to which Phase(s) this regulation it applies. Therefore section 5007 also fails to meet the clarity standard.

For the reasons set forth above, the SJTA requests the DSC remove section 5007 from the regulatory package.

Very truly yours,

O’LAUGHLIN & PARIS LLP



TIM O’LAUGHLIN

TO/tb

cc: San Joaquin Tributaries Authority